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IN THE

Supreme Court of the United States

October Term, 1958

NO. 251

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, deceased,

Petitioner,

- VS -

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,

Respondent.

BRIEF FOR RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

LOUIS KURZ
704 Florida Theatre Building
Jacksonville, Florida

CLARK W. TOOLE, JR.
704 Florida Theatre Building
Jacksonville, Florida
Attorneys for Respondent

KURZ & TOOLE
704 Florida Theatre Building
Jacksonville 2, Florida
Of Counsel for Respondent

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STATEMENT OF THE CASE

The Petitioner was Appellee and Respondent was Appellant in the Court of Appeals. Respondent, in the interest of brevity, will use the symbol "R" when referring to the Record-on-Appeal, the symbol "A" when referring to Petitioner's Appendix, and the symbol "B" when referring to Petitioner's Brief. Since the filing of Petitioner's brief the opinion of the Court below has been recorded in 267 F. 2d at page 329.

STATEMENT OF THE FACTS

The Petitioner's "The Facts of the Injury" is based largely upon argument and inferences which a jury could have drawn rather than actual testimony and is, to that extent, misleading. For instance, on page four of Petitioner's Brief it is stated Anderson put down a burning fusee, citing pages 144-145 of the Record. A reading of the testimony shows the witness attempted to explain that what he had first assumed was a burning fusee was actually a reflection from the red Mars light on Train No. 236 when it was put into emergency (R. 2[illegible]). There was direct testimony by all of the eyewitnesses that Anderson did not light a fusee and flag No. 236 prior to the accident (R. 43, 456, 492). No useful purpose can be served in attempting to state what the facts were and what the facts were not as the pertinent facts are clearly and concisely stated by the Court of Appeals in its opinion (R. 726-727; A. 11-12). Respondent respectfully submits that the question presented should be considered in the light of the facts as found by the Court of Appeals rather than Petitioner's Argumentative and misleading statement.

QUESTION PRESENTED

The Petitioner has unduly restricted and narrowed the points presented in the Court of Appeals and to this Court. The Court of Appeals based its opinion upon the premise that under the facts presented the "Doctrine of Last Clear Chance" was inapplicable. Appellant in that Court, Respondent here, also relied upon and argued the point that the Last Clear Chance Doctrine has no place in an action under the Federal Employers Liability Act because that statute has substituted the comparative negligence doctrine and therefore the reason for

the application of the last clear chance principle in common law actions no longer exists (R. 729-730; A. 14-15).

ARGUMENT

REASONS FOR DENYING CERTIORARI:

(1) The Petition for Certiorari is without merit.

(2) The Doctrine of Last Clear Chance is not applicable to actions under the Federal Employers Liability Act.

(3) The Doctrine of Last Clear Chance was not applicable under the evidence.

(1) THE PETITION FOR CERTIORARI IS WITHOUT MERIT:

In citing *Rogers vs. Missouri-Pacific RR. Co.*, 325 U.S. 500, 509; 77 S. Ct. 443, 1 L. Ed. 2d 493; *Arnold vs. Panhandle & San Francisco RR. Co.*, 353 U.S. 360, 77 S. Ct. 1375, 1 L. Ed. 2d 889; *Ringhiser vs. Chesapeake & Ohio RR. Co.*, 354 U. S. 901, 77 S. Ct. 1093; 1 L. Ed. 2d 1268; *Brown vs. Western RR. of Ala.*, 338 U.S. 294, 94 L. Ed. 100; *Wilkerson vs. McCarthy*, 336 U. S. 53, 93 L. Ed. 497; *Owens vs. Union-Pacific RR. Co.*, 319 U. S. 715, 87 L. Ed. 1683; *Coray vs. So. Pacific Co.*, 335 U.S. 520, 93 L. Ed. 208; *Fairport P. & E. R. Co. vs Meredith*, 292 U.S. 589, 598; 78 L. Ed. 1446 and *Urie vs. Thompson*, 337 U.S. 163, 93 L. Ed. 1282, 1297, the Petitioner contends the opinion of the Court of Appeals is in conflict with these decisions of this Court, thereby calling for the discretionary jurisdiction of this Court under the Supreme Court Rule 19(b) because Petitioner has been deprived of the "fruits of a jury verdict". Analyzing these cases it appears for the most part

that they were reviewed by this Court upon the sufficiency of the evidence of negligence to maintain an action under the Federal Employers Liability Act. Not one decision in the above cases cited by the Petitioner conflicts with the view of the Court of Appeals that the Doctrine of Last Clear Chance does not apply in the case at bar. On the contrary, the Court of Appeals gave effect to the decisions of this Court in *Rogers vs. Missouri-Pacific RR. Co.*, supra, and others, by holding that Respondent's Motion for Directed Verdict and for the entry of a judgment non obstante veredicto were properly overruled (R. 729; A. 14). It clearly appears that the opinion of the Court of Appeals is not in conflict with the cases cited but is, in fact, in accord with this Court's interpretation of the Federal Employers Liability Act.

The opinion of the Court of Appeals is in harmony with the cited decisions and not in conflict therewith, leaving nothing for this Court to review other than the action of the Court of Appeals in holding that the Doctrine of Last Clear Chance was not applicable under the evidence of the case at bar. It is therefore submitted that no sufficient, substantial question has been raised within the meaning of Supreme Court Rule 19(b). The Petitioner has been deprived of nothing to which he is entitled under the Federal Employers Liability Act. The Court of Appeals has expressly decreed a trial by jury on the issue of negligence and the Petition for Certiorari merely seeks to have this Court review the evidence and perhaps second guess the Court of Appeals as to the applicability of the Docetrine of Last Clear Chance under the evidence.

(2) THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO ACTIONS UNDER THE FEDERAL EMPLOYERS LIABILITY ACT.

Last Clear Chance had its origin in the old English case

of *Davies vs. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588, decided in 1842. This doctrine was devised to prevent miscarriage of justice by the harsh rule that one, who by his own negligence contributed to his own hurt, could not under any circumstances recover.

The law is otherwise where the doctrine of comparative negligence has been substituted for the rule that contributory negligence is a bar to recovery. The modern legal writers and the better reasoned decisions furnish impressive authority for the conclusion that reason and legal justification for last clear chance as an exception to the contributory negligence rule ceases to exist in jurisdictions applying the comparative negligence rule. Retaining this doctrine has been called "absurd." 33 Can. B. Rev. 257. See Prosser, *Handbook of Torts*, 2d Ed. 292; 2 Harper & James, *Torts*, 1251-1252, N. 26; MacIntyre, *Rationale of Last Clear Chance*, 53 Harv. L. Rev. 1225; James, *Last Clear Chance: A Transitional Doctrine*, 47 Yale L. J. 704.

In *Smith vs. American Oil Co.*, 77 Ga. App. 463, 49 S.E. 2d 90, the Georgia court, in refusing to apply last clear chance in a comparative negligence situation, stated at page 490:

> "It will thus be seen that the doctrine of contributory negligence under the common law and that doctrine as modified by the rule of last clear chance under the common law, have no place in our rules of comparative negligence and apportionment of damages under our code sections as such. Such doctrine or rule of contributory negligence and the rule of last clear chance are involved in and vanish as such into our principle of comparative negligence and apportionment of damages."

The Supreme Court of Florida has recently held that the Doctrine of Last Clear Chance does not apply in comparative negligence cases and has expressly overruled its earlier decisions holding otherwise. *Loftin vs. Nolan, Fla.*, 86 So. 2d 161, 59 A.L.R. 2d 1257.

The Congress of the United States in specifically enacting the comparative negligence doctrine as a part of the Federal Employers Liability Act did not leave to discretion and make dependent thereon the rights of railroad workers to recover upon the niceties of the common law rule of contributory negligence and its exception, the Doctrine of Last Clear Chance.

Title 45, U.S.C.A., Sec. 53, specifically states:

> "... the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be dimished by the jury in proportion to the amount of negligence attributable to such employee ..."

Mr. Justice Douglas in *Bailey vs. Central Vermont RR. Co.*, 319 U.S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062, has aptly pointed out that the Federal Employers Liability Act creates Federal rights largely fashioned from the common law *except as Congress has written different standards into the Act*. Among those different standards is the substitution of the comparative negligence principle and apportionment of damages in accordance with the relative fault of the parties. The basis for recovery, clearly spelled out in the Act, may be stated as follows: If only the employer was negligent, full recovery; if only the employee was negligent, no recovery; but if both employer and employee are negligent, apportion-

ment of damages. By giving the charge of last clear chance the Court superimposed another element of liability; i.e., that if both employer and employee are negligent but in the eyes of the jury the employer could have avoided the injury notwithstanding the contributory negligence of the employee, the apportionment principle applicable under the statute may be disregarded and the full amount of damages awarded to the employee.

Likewise, Mr. Justice Brennan, in discussing the views of the Supreme Court of Missouri on proximate cause in *Rogers vs. Missouri-Pacific RR. Co.*, supra, stated at pages 509-510:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases."

Under the common law the Doctrine of Last Clear Chance was just as available to the negligent defendant as it was to a negligent plaintiff in a proper situation. *Friedman vs. Morris*, 4 Cir., 1954, 209 F. 2d 886. Certainly no one would seriously contend that a negligent railroad could use the Doctrine of Last Clear Chance to escape liability under the Federal Employers Liability Act, since the Act itself provides otherwise. It is equally obvious that if the Doctrine of Last Clear Chance is not available to permit a negligent railroad to escape liability under the Act it cannot be used by a negligent employee to escape diminution of damages for his negligence under the Act. The codification of the doctrine of comparative negligence into the Federal Employers Liability Act

effectively remove the necessity for the last clear chance doctrine in Federal Employers Liability Act cases and the District Court was in error in charging the jury thereon.

We have been able to find no cases in which the Supreme Court of the United States has held that the last clear chance doctrine is applicable under the Act. The doctrine is referred to in *St. Louis-Southwestern Ry. Co. vs. Simpson, Adm.*, 286 U.S. 46, 76 L. Ed. 1152, but the Court in that case held that it was inapplicable under the facts because the negligence of the engineer in disobeying a train order was a continuing one and that there was no opportunity on the part of the conductor, in view of the shortness of time, to avoid the collision in which the engineer met his death.

(3). THE DOCTRINE OF LAST CLEAR CHANCE WAS NOT APPLICABLE UNDER THE EVIDENCE.

It is crystal clear from the testimony that Flagman Anderson was negligent. The District Court stated (A. 19):

> "... if the negligence on the plaintiff's part and that on the part of the defendant railroad company can be apportioned, certainly the greater percentage of the negligence involved was that of the plaintiff and not of the defendant railroad."

Flagman Anderson disregarded every cardinal rule of safety in sitting on the track upon which he knew Train No. 236 would shortly pass. He violated his mandatory duty to flag Train No. 236 (R. 43) and his duty to protect his own train, No. 225. *Great Northern Ry. Co. vs. Wiles, Adm.*, 240 U.S. 444. He failed to exercise any care or precaution for his own safety. His negligence was continuing, *St Louis & Southwestern Ry.*

Co. vs Simpson, supra, and concurrent, *Kan. City Sou. Ry. Co. vs. Ellzey*, 275 U.S. 236, 72 L. Ed. 259, 485 S. Ct. 80. This court there held that where several acts of negligence are so closely welded together in time as well as in quality they could not be viewed as independent acts, last clear chance was not applicable. See also *Sou. Ry. Co. vs. Melton*, 198 So. 588; *Ward vs. City Fuel Oil Co.*, 147 Fla. 320, 2 So. 2d 586; *Davis vs. Cuesta*, 146 Fla. 471, 1 So. 2d 475.

In *Sou. Ry. Co. vs. Melton*, supra, an action under the Federal Employers Liability Act for injuries to a signal maintainer in a collision between a train and his automobile, the Alabama Supreme Court in holding last clear chance not applicable stated at page 594:

> "In the instant case, decedent if on duty as contended, was under a specific burden to watch out for and avoid trains operated in the usual way.' *Chesapeake & Ohio Ry. Co. vs Nixon*, 271 U.S. 218, 46 S. Ct. 495, 70 L. Ed. 914. This was a continuing duty up to the very time of the impact, and whether he had actual knowledge of his imminent danger or the alleged negligence of the engineer or not. This duty was not conditioned on such knowledge and was concurrent with and even subsequent to the engineer's negligence if possible. His duty was so welded with everything which immediately transpired then and there in terms of a few seconds as to make them all parts of an unified act in which the doctrine of last clear chance does not apply under the authority of *St. Louis and Southwest Railway Co. vs. Simpson*, supra."

There was no evidence that the Plaintiff was in a position of peril from which he could not extricate himself. The testi-

mony is uncontradicted that all of the eyewitnesses on Train No. 236 were looking for Flagman Anderson from the time the torpedoes were struck until he was discovered sitting on the rail (R. 53-54) and the fact that Flagman Anderson was not discovered until too late to avoid hitting him is uncontroverted (R. 16). There is no probability that a reasonably careful person under similar circumstances could have done any more than was done. See *Sou. Ry. Co. vs Gray*, 241 U.S. 333, in which this court has held that there was no duty on the part of the engineer to expect a brakeman to be asleep on the railroad; *DeBaur vs. LeHigh Valley RR. Co.*, 269 Fed. 964; *Pa. RR. Co. vs. Swartzel*, 2 Cir., 17 F. 2d 869; *Deere vs. Sou. Pacific RR. Co.*, 9 Cir., 123 F. 2d 438.

Petitioner has cited several decisions from other Federal circuits involving particular treatment of the Doctrine of Last Clear Chance (Br. 8-9). Most of these decisions arise from pedestrian and automobile collisions which were tried in District Courts where the substantive law of the particular state controlled the application of the Doctrine of Last Clear Chance. If it is Petitioner's contention that the substantive state law should govern, the case at bar would be controlled by the law of Florida which expressly hold that last clear chance is not applicable in comparative negligence cases. *Loftin vs. Nolan*, supra, It further appears from the cases cited by Petitioner that none of these decisions involve the Federal Employers Liability Act and the rule of contributory negligence applied. It is respectfully submitted that none of these decisions are authority on the question before this Court and the opinion of the Court of Appeals that last clear chance had no application to the case at bar is correct.

CONCLUSION

It is respectfully submitted that upon a careful consideration of the Petition for Certiorari, the briefs and the Record, it will be found that the opinion of the Court of Appeals, in holding: (1) that the Doctrine of Last Clear Chance was not applicable under the evidence, and (2) that the issues of negligence were proper for the jury under correct instructions of law, is in accord with the applicable decisions of this Court. Respondent further submits that no substantial question has been presented to justify a review of the action of the Court of Appeals and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LOUIS KURZ
704 Florida Theatre Building
Jacksonville, Florida

CLARK W. TOOLE, JR.
704 Florida Theatre Building
Jacksonville, Florida

Attorneys for Respondent

KURZ & TOOLE
704 Florida Theatre Building
Jacksonville 2, Florida

Of Counsel for Respondent

CERTIFICATE OF SERVICE

I, CLARK W. TOOLE, JR., one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1959, I served a full, true and correct copy of the foregoing Brief for Respondent, on ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased, Petitioner herein, by mailing such a copy in a duly addressed envelope with first class postage prepaid to her attorneys of record, addressed as follows:

THOMAS A. LARKIN, ESQ.
604 Lynch Building
Jacksonville 2, Florida

WILLIAM MIZELL HOWELL, ESQ.
601 Atlantic National Bank Building
Jacksonville 2, Florida

RALPH E. SISTRUNK, ESQ.
705 Lynch Building
Jacksonville 2, Florida

and duly deposited the same in the United States Post Office at Jacksonville, Florida, on the said date.

CLARK W. TOOLE, JR.

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THOMAS A. LARKIN,
604 Lynch Building,
Jacksonville 2, Florida.

WILLIAM MIZELL HOWELL,
601 Atlantic National Bank Building,
Jacksonville 2, Florida.

RALPH E. SESTRUNK,
705 Lynch Building,
Jacksonville 2, Florida,

Attorneys for Petitioner.

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PETITIONER'S REPLY BRIEF.

It may not be amiss to say one or two things about respondent's brief even though they are so obvious.

1. The statement at the top of respondent's page 2 that

> "The Petitioner's 'The Facts of the Injury' is based largely upon argument and inferences *which a jury could have drawn* rather than actual testimony and is, to that extent misleading". (Emphasis ours.)

is inconsistent within itself, and suggests its own answer: if the inferences could have been drawn by a jury, the facts for their basis could not be misleading, and the jury only, not the Court of Appeals as respondent suggests on that

page 2, was authorized to draw them. *Lavender v. Kurn*, 327 U. S. 645, 653, 90 L. Ed. 916, 922.

2. At its page 4 respondent states that this Court is being requested by petitioner to review "the action of the Court of Appeals in holding that the doctrine of last clear chance was not applicable under the evidence . . .". We truly hope that our petition is not as obscure as counsel's understanding of it. As we read the opinion of the Court of Appeals, it made no holding that the doctrine is not applicable. It toyed with the idea and then passed it by without making any decision about it. What the Court did hold is as submitted on page 3 of our petition, and all that it held was (R. 734):

> "In an *Fela* case there must be a discovery of the peril before last clear chance comes into play. It is not enough that the peril might have been discovered by the exercise of reasonable care. The instruction given was erroneous and *because of the error* we reverse for a new trial". (Italics added.)

All in all the Court of Appeals has made a choice least advantageous to the petitioner. In doing so the Court of Appeals has not taken to heart the teaching of *Jesionowski v. Boston & Maine Railroad*, 329 U. S. 452, 457, 91 L. Ed. 416, 421, that the real question in these railroad employee cases "is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding" by the jury in the employee's favor.

Accordingly we ask leave to renew our submission that a jury having made the award and the Court of Appeals agreeing that the case was for the jury, and declining to

reduce the amount of the verdict, this Court not permit that court to thwart the verdict by the oblique method adopted.

Respectfully submitted,

THOMAS A. LARKIN,
604 Lynch Building,
Jacksonville 2, Florida.

WILLIAM MIZELLE HOWELL,
601 Atlantic National Bank Building,
Jacksonville 2, Florida.

RALPH E. SISTRUNK,
705 Lynch Building,
Jacksonville 2, Florida.

Attorneys for Petitioner.